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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

CAROLYN ROBERTS, Individually, and STACY ROBERTS, GAIL ROBERTS and MATTHEW ROBERTS, by CAROLYN ROBERTS, Their Guardian Ad Litem,

Petitioners,

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TOPICAL INDEX

	Page
Table of Authorities	vi
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THIS WRIT	12
ARGUMENT	14

Page

I THE OPINION OF THE COURT OF APPEALS BELOW HAS ACKNOWLEDGED THAT THERE IS A CONFLICT OF AUTHORITY AMONG THE LOWER COURTS ON THE CRUCIAL LEGAL ISSUE ON WHICH THIS CASE TURNS (I.E., THE DISPUTED INTERPRETATION OF THE 1960 AMENDMENT TO SEC. 2 OF THE SUITS IN ADMIRALTY ACT [46 USC SEC. 742]); AND THERE ARE NO DECISIONS FROM THE SUPREME COURT ON THAT CRUCIAL LEGAL ISSUE: AND THIS CASE WAS ONE OF FIRST IMPRESSION IN THE NINTH CIRCUIT AS TO THAT CRUCIAL LEGAL ISSUE. 14

II IN ITS RESOLUTION OF THE PURPORTED CONFLICT OF JURISDICTION BETWEEN THE FEDERAL TORT CLAIMS ACT AND THE SUITS IN ADMIRALTY ACT, AS SUCH CONFLICT RELATES TO AVIATION TORT CLAIMS ON NAVIGABLE WATERS, THE DECISION OF THE COURT OF APPEALS BELOW IS SQUARELY IN CONFLICT WITH THE HOLDING OF THE THIRD CIRCUIT IN BLUMENTHAL V. UNITED STATES, 306 F.2ND 16 (3RD CIR. 1962), AFFIRMING THE OPINION OF

Page

THE DISTRICT COURT REPORTED AT 189 F. SUPP. 439 (E. D. -PA., 1960). RESOLUTION OF THAT CONFLICT BY THE SUPREME COURT IS NECESSARY IN THIS CASE. 22

III AS THE OPINION OF THE COURT OF APPEALS BELOW HAS STATED, THIS CASE RAISES THE VERY ISSUE WHICH THE SUPREME COURT EXPRESSLY LEFT UNANSWERED IN EXECUTIVE JET AVIATION, INC. V. CITY OF CLEVELAND, 409 U.S. 249 (1972), (I.E., WHETHER AN AVIATION TORT CLAIM IS COGNIZABLE UNDER MARITIME LAW, WHERE THE AVIATION ACCIDENT OCCURS DURING A TRANSOCEANIC FLIGHT). 25

IV THE DECISION OF THE COURT OF APPEALS BELOW RAISES A VERY SIGNIFICANT ISSUE OF FEDERAL STATUTORY CONSTRUCTION WHICH REQUIRES RESOLUTION BY THE SUPREME COURT, PARTICULARLY TO THE EXTENT THAT THE COURT OF APPEALS' DECISION CONSTITUTES A HOLDING THAT THE 1960 AMENDMENT TO 46 USC SEC. 742 WAS A REPEAL

		Page
	BY IMPLICATION OF THE PRE-1960 CONSENT OF THE UNITED STATES THAT HAD PERMITTED MARITIME WRONGFUL DEATH ACTIONS TO BE MAINTAINED AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT.	28
V	THE DECISION OF THE COURT OF APPEALS BELOW (WHICH INTERPRETS THE INTENT OF CONGRESS IN ENACTING THE 1960 AMENDMENT TO 46 USC SEC. 742), HAS CAUSED A MOST SIGNIFICANT FEDERAL CONSTITUTIONAL ISSUE TO BE PRESENTED, WHICH IS WHETHER THE LANGUAGE CONTAINED IN 46 USC SEC. 742 VIOLATES FEDERAL CONSTITUTIONAL STANDARDS OF VAGUENESS AND FAIR WARNING.	31
VI	A JUDICIAL DEFINITION BY THE SUPREME COURT IS NEEDED OF THE WORD "STATE" CONTAINED IN THE DEATH ON THE HIGH SEAS ACT (46 USC SEC. 761 ET SEQ.). THIS CASE PRESENTS THAT ISSUE FOR DETERMINATION.	37

Page

VII INTERVENTION BY THE SUPREME COURT IS NECESSARY IN THIS CASE TO PREVENT THE COURT OF APPEALS' ADMITTEDLY "HARSH RESULT" FROM PERPETRATING A MANIFEST MISCARRIAGE OF JUSTICE UPON PETITIONERS. 39

VIII THE RECURRING NATURE OF THE ISSUES HEREIN PRESENTED (CONCERNING AVIATION TORT CLAIMS) CAUSES THOSE ISSUES TO ASSUME ENORMOUS GENERAL IMPORTANCE DUE TO THE CONTINUOUS EXPANSION OF AVIATION ACTIVITIES ON AN INTERNATIONAL SCOPE. RESOLUTION OF CRUCIAL LEGAL ISSUES THAT HAVE THUS FAR GONE UNRESOLVED BY THE SUPREME COURT, IS NECESSARY FOR THE BENEFIT OF ALL LOWER COURTS, THE BAR, AND THE AVIATION INDUSTRY. 41

CONCLUSION 43

TABLE OF AUTHORITIES

Cases	Page
Blumenthal v. United States (1962) 306 F. 2d 16	8, 11, 12, 22, 23, 39, 40
Bouie v. City of Columbia (1964) 378 U.S. 347	23, 32, 33, 35
Calmar S.S. Corp. v. U. S. (1953) 345 U.S. 466	24
Executive Jet Aviation, Inc. v. City of Cleveland (1972) 409 U.S. 249	4, 12, 25, 26
Galef v. U.S. (1928) 25 F. 2d 134	38
J. W. Petersen Coal & Oil Co. v. United States (1970) 323 F. Supp. 1198	19, 20, 21
Jones v. Alfred H. Mayer Co. (1968) 392 U.S. 409	29
Kropp v. Douglas Aircraft Co. (1971) 329 F. Supp. 447	24, 25
Lambert v. People of the State of California (1957) 355 U.S. 225	35, 36
McBoyle v. United States (1931) 283 U.S. 25	33

	Page
McMaster v. New York Life Insurance Co. (1901) 183 U.S. 25	35
Milliken v. Meyer (1940) 311 U.S. 457	39
Moragne v. States Marine Lines, Inc. (1970) 398 U.S. 375	27, 38
Moran v. United States (1951) 102 F. Supp. 275	8, 39, 40
Osborn v. Nicholson (1871) 80 U.S. 654	30
Panama Railroad v. Napier Shipping Company (1897) 166 U.S. 280	38
Pritchard v. Norton (1882) 106 U.S. 124	36
Rosenberg v. United States (1953) 346 U.S. 273	29
United States v. Heth (1806) 7 U.S. 399	35
United States v. Pennsylvania Chemical Corporation (1973) 411 U.S. 655	39, 40
Wilmot v. Mudge (1880) 103 U.S. 217	29

Page

Wynne v. United States (1910)
217 U.S. 234 38

Constitution

Constitution of the United States,
5th Amendment 6

Statutes

28 USC
§1292(b) 2

§1346(b) 5, 8, 10, 12, 13, 18, 22, 27, 28, 29, 32, 34, 36, 41

§2401(b) 6, 7, 9

§2671 5, 8

§2674 6

§2675 6, 7

§§2679, 2680 6

46 USC
§740 6

§741 9, 22, 23

§§741-752 3, 6

§742 3, 4, 5, 10, 11, 12, 13, 14, 19, 22, 28, 31, 32, 33, 34, 37

Page

46 USC
§§761-767 6, 8, 10, 13, 23, 24, 37, 38, 39

§781 23, 41

§§781-790 6

Textbooks

2 Jayson Handling Federal Tort Claims
§257 17, 18

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PETITION FOR WRIT OF CERTIORARI
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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on June 6, 1974, petition for rehearing denied July 9, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals below, as yet unreported, is attached hereto as Appendix A. By said opinion, the Court of Appeals reversed an order of the District Court for the Central District of California, in which the District Court had denied the United States' Motion for Dismissal of Petitioners' Complaint.

The Minute Order issued by the District Court for the Central District of California which denied the motion of the United States to dismiss petitioners' First Amended Complaint (unpublished) is attached hereto as Appendix B.

The "Order Amending Order Denying Motion to Dismiss," signed and filed in the District Court for the Central District of California on June 12, 1973 (unpublished) by the terms of which the District Court certified its order entered April 30, 1973 for interlocutory appeal under 28 USC Sec. 1292(b), is attached hereto as Appendix C.

The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing, which Order was filed on July 9, 1974, is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit was entered on June 6, 1974. A timely Petition for Rehearing was denied on July 9, 1974. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

1. Where the opinion of the Court of Appeals below has acknowledged that there is a conflict of authority among the lower courts on the crucial legal issue on which this case turns (i.e., the disputed interpretation of the 1960 amendment to Section 2 of the Suits in Admiralty Act [46 U.S.C. §742]); and there are no decisions from the Supreme Court on that crucial legal issue; and the case was one of first impression in the Ninth Circuit as to that crucial legal issue; -- under such circumstances, where the law applicable is admittedly unclear, can a statute of limitations bar be constitutionally applied to absolutely bar a plaintiff's cause of action for wrongful death against the United States?

2. In a case which does not involve a "public vessel," can it properly be held that plaintiff's sole and exclusive remedy for wrongful death is under those laws entitled "Suits in Admiralty by or Against Vessels or Cargoes of United States," (46 U.S.C. §§741-752)?

3. In actions against the United States for aviation wrongful death occurring in navigable waters, did Congress, by its 1960 amendment to Sec. 2 of the Suits in Admiralty Act (46 USC Sec. 742) thereby revoke and repeal the United States' pre-1960 waiver of sovereign immunity that had previously authorized such claims against the United States to be asserted under the Federal Tort Claims Act?

4. If (as the Court of Appeals below has held in this case) the 1960 amendment to Section 2 of the Suits in Admiralty Act (46 U.S.C. §742) did constitute a repeal and revocation of the United States' pre-1960 consent to having such claims asserted under the Federal Tort Claims Act; -- does the language used in 46 U.S.C. §742 to manifest such repeal violate Federal constitutional standards of vagueness and fair warning?

5. Where an amending statute (46 USC Sec. 742) contains no express revocation of a prior waiver of sovereign immunity, can such a revocation be found by implication without violating Federal constitutional standards of fair warning?

6. Concerning aviation tort claims, the opinion of the Court of Appeals below stated: "This appeal invites an examination of whether, under the circumstances shown here, an aviation tort claim is cognizable under maritime law." As acknowledged by the Court of Appeals below, the Supreme Court expressly reserved decision on this question in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). That question is squarely

presented by this case.

7. Do the words "occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories of or dependencies of the United States," found in 46 USC §761 (Death on the High Seas Act) refer to States of the United States of America? Or is the foreign country of Okinawa considered a "State" within the meaning of 46 USC §761?

8. Concerning aviation tort claims for death occurring on navigable waters, are the tort remedies against the United States provided by 46 USC §742 (Suits in Admiralty) and the Federal Tort Claims Act (28 USC §1346(b) and §2671 et seq.), mutually exclusive to the extent that a plaintiff will suffer an absolute forfeiture of his cause of action if it turns out that his attorney guessed wrong?

9. Where the decision of the Court of Appeals below has by the Court's own admission reached a "harsh result," where the crucial legal issues on which the case turns are manifestly unclear, should the Supreme Court exercise its power of supervision over the lower court to prevent the perpetration of a harsh miscarriage of justice?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; . . . ."

(2) Federal Tort Claims Act, 28 USC §1346(b); §2401(b); §2674; §2675; §2679; §2680. (Texts of applicable statutes are at Appendix E, pp. 1-5).

(3) Suits in Admiralty by or against Vessels or Cargoes of United States, Title 46 U. S. Code, Chapter 20. (46 USC §§741-752). (Texts of the statutes are at Appendix E, pp. 5-13).

(4) 46 USC §740 - Extension of Admiralty and Maritime Jurisdiction. (Text of statute is at Appendix E, pp. 13-14).

(5) Death on the High Seas Act, Title 46, U. S. Code, Chapter 21. (46 USC §§761-767). (Texts of statutes are at Appendix E, pp. 14-17).

(6) Suits in Admiralty Against United States for Damages Caused by Public Vessels ("Public Vessels Act"), Title 46 U. S. Code, Chapter 22. (46 USC §§781-790). (Texts of statutes are at Appendix E, pp. 17-21).

STATEMENT OF THE CASE

Petitioners are the widow and three minor children of Decedent Walter Roberts, who died on July 27, 1970 when the cargo plane on which he was the navigator crashed in navigable waters off the coast of Okinawa. The plane, which was owned by Flying Tiger Lines, was approaching the Naha Air Base, Okinawa, for a ground controlled landing when it crashed in navigable waters 1500 to 1900 feet short of the runway.

The subject aircraft was on a trans-oceanic cargo flight that had originated in Los Angeles, and was bound for Vietnam.

Petitioners filed a timely administrative claim under the Federal Tort Claims Act (28 USC Sec. 2401[b] and Sec. 2675) on July 26, 1972, which was rejected by the appropriate Federal agency on August 22, 1972. Petitioners then filed a timely suit under the Federal Tort Claims Act against the United States on November 21, 1972 in the District Court for the Central District of California. By their First Amended Complaint, petitioners asserted two bases of liability against the United States:

(1) That United States Air Force personnel negligently directed the ground controlled landing; and

(2) That after the crash of the aircraft in navigable waters, United States Air Force personnel negligently failed to rescue plaintiffs'

decedent from said waters.

Petitioners' counsel proceeded against the United States under the Federal Tort Claims Act, relying on the authority of Blumenthal v. United States, 306 F. 2d 16 (3rd Cir. 1962), affirming the District Court's opinion at 189 F. Supp. 439 (E. D. -Pa. 1960); and Moran v. United States, 102 F. Supp. 275 (Conn. 1951).

Petitioners' First Amended Complaint pleaded three causes of action, all relying upon the same specific acts of negligence described above. The First Cause of Action asserted that the District Court had jurisdiction under the Federal Tort Claims Act (28 USC Sec. 1346(b) and Sec. 2671 et seq.); the Second Cause of Action was asserted as a "Maritime Wrongful Death" under the general admiralty and maritime jurisdiction (Federal Rule of Civil Procedure 9(h); and the Third Cause of Action was based on the "Death on the High Seas Act," (46 USC Sec. 761-767), and asserted that the subject plane crash and death occurred in navigable waters on the high seas "more than a marine league from the shores of the United States."

The Government moved to dismiss the First Amended Complaint, contending that the aviation crash did not give rise to a maritime claim. Secondarily, the Government contended that even if maritime jurisdiction were appropriate, petitioners' suit against the United States was cognizable solely under the statutes entitled "Suits in Admiralty By Or Against Vessels Or Cargoes Of The United States,"

(46 USC Sec. 741-752).

The District Court below rejected the Government's contention, and at oral argument the District Court stated: "I think where the Government is in error is that you're trying to rely on the Admiralty Section, which involves public vessels and we don't have a suit against public vessels here." The District Court concluded that it had jurisdiction to entertain petitioners' suit as a maritime wrongful death action under the Federal Tort Claims Act.

The District Court below certified its order denying the Government's Motion to Dismiss, for Interlocutory Appeal under 28 USC Sec. 1292(b) (Appendix C), the District Court being of the opinion that the Government's Motion to Dismiss raised a close jurisdictional question.

The Court of Appeals for the Ninth Circuit reversed the District Court and held that the Government's Motion to Dismiss should have been granted (Appendix A, p. 10). A Timely Petition for Rehearing filed by your petitioners was denied by the Court of Appeals below on July 9, 1974 (Appendix D, pp. 1-2).

The Court of Appeal below held that although petitioners' administrative claim and lawsuit were both timely filed under the Federal Tort Claims Act (FTCA) (28 USC Sec. 2401[b]), petitioners should have filed their suit under the Suits in Admiralty Act (46 USC Sec. 741-752).

In making its decision, the Court of Appeal below held: (a) that by reason of the 1960 amendment to Sec. 2 of the Suits in Admiralty Act (46 USC Sec. 742), all aviation wrongful death actions against the United States arising under the general maritime law or under the Death on the High Seas Act must now be brought exclusively under the Suits in Admiralty Act (SIA); and (b) that the necessary corollary is that petitioners' action for aviation wrongful death in this case cannot be maintained under the FTCA (Appendix A, pp. 8-9).

The Court of Appeal below stated: "We therefore conclude that to the extent that appellees' claim is cognizable in admiralty, it is governed by the Suits in Admiralty Act and absolutely time-barred by Sec. 745 of that Act. The Government's Motion to Dismiss should have been granted." (Appendix A, p. 10).

The opinion of the Court of Appeal below acknowledged that the result reached was "harsh" (Appendix A, p. 9), and further stated that petitioners' maritime claim here presented was properly maintainable under the FTCA prior to the 1960 amendment to the Suits in Admiralty Act (46 USC Sec. 742). The Court of Appeal below (while acknowledging that there was post-1960 judicial authority to the contrary) held that the 1960 amendment to 46 USC Sec. 742, ". . . has been interpreted by a majority of courts as a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA." (Citations of supporting and contrary

authorities follow). (Appendix A, p. 8).

The above holding of the Court of Appeals for the Ninth Circuit in this case is squarely contrary to the post-1960 decision of the Third Circuit Court of Appeals in Blumenthal v. United States, 306 F. 2d 16 (3rd Cir. 1962), which affirmed the opinion of the District Court which is at 189 F. Supp. 439 (E. D. -Pa. 1960). Although the Blumenthal case, supra, was extensively briefed and argued in the Court of Appeals below, the case was not cited or mentioned at all in the opinion of the Court of Appeals below (Appendix A). Concerning the Blumenthal case, supra, during oral argument in the Court of Appeals below, Circuit Judge Hufstedler very correctly pointed out to counsel that the Ninth Circuit is not bound to follow the decisions of the Third Circuit.

In the Ninth Circuit, this was a case of first impression as to the crucial issue on which the Court of Appeals below held that the case must be summarily dismissed. There are no decisions of the Supreme Court on that crucial issue (i.e., the disputed interpretation of the 1960 amendment to 46 USC Sec. 742).

Petitioners respectfully pray that this Court grant a Writ of Certiorari in this case to resolve the obvious conflicts in the various lower courts concerning the crucial issues of Federal statutory construction on which this case turns.

REASONS FOR GRANTING THIS WRIT

(I) The opinion of the Court of Appeals below has acknowledged that there is a conflict of authority among the lower courts on the crucial legal issue on which this case turns (i.e., the disputed interpretation of the 1960 amendment to Sec. 2 of the Suits in Admiralty Act [46 USC Sec. 742]); and there are no decisions from the Supreme Court on that crucial legal issue; and this case was one of first impression in the Ninth Circuit as to that crucial legal issue.

(II) In its resolution of the purported conflict of jurisdiction between the Federal Tort Claims Act and the Suits in Admiralty Act, as such conflict relates to aviation tort claims on navigable waters, the decision of the Court of Appeals below is squarely in conflict with the holding of the Third Circuit in Blumenthal v. United States, 306 F. 2d 16 (3rd Cir. 1962), affirming the opinion of the District Court reported at 189 F. Supp. 439 (E. D. -Pa., 1960). Resolution of that conflict by the Supreme Court is necessary.

(III) As the opinion of the Court of Appeals below has stated, this case raises the very issue which the Supreme Court expressly left unanswered in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), (i.e., whether an aviation tort claim is cognizable under maritime law, where the aviation accident occurs during a trans-oceanic flight).

(IV) The decision of the Court of Appeals below raises a very significant issue of Federal statutory construction which requires resolution by the Supreme Court, particularly to the extent that the Court of Appeals' decision constitutes a holding that the 1960 amendment to 46 USC Sec. 742 was a repeal by implication of the pre-1960 consent of the United States that had permitted maritime wrongful death actions to be maintained against the United States under the Federal Tort Claims Act.

(V) The decision of the Court of Appeals below (which interprets the intent of Congress in enacting the 1960 amendment to 46 USC Sec. 742), has caused a most significant Federal Constitutional issue to be presented, which is whether the language contained in 46 USC Sec. 742 violates Federal Constitutional standards of vagueness and fair warning.

(VI) A judicial definition by the Supreme Court is needed of the word "State" contained in the Death on the High Seas Act (46 USC Sec. 761). This case presents that issue for determination.

(VII) Intervention by the Supreme Court is necessary in this case to prevent the Court of Appeals' admittedly "harsh result" from perpetrating a manifest miscarriage of justice upon petitioners.

(VIII) The recurring nature of the issues herein presented (concerning aviation tort claims) causes those issues to assume enormous general importance due to the continuous

expansion of aviation activities on an international scope. Resolution of crucial legal issues that have thus far gone unresolved by the Supreme Court, is necessary for the benefit of all lower courts, the Bar, and the aviation industry.

ARGUMENT

I

THE OPINION OF THE COURT OF APPEALS BELOW HAS ACKNOWLEDGED THAT THERE IS A CONFLICT OF AUTHORITY AMONG THE LOWER COURTS ON THE CRUCIAL LEGAL ISSUE ON WHICH THIS CASE TURNS (I.E., THE DISPUTED INTERPRETATION OF THE 1960 AMENDMENT TO SEC. 2 OF THE SUITS IN ADMIRALTY ACT [46 USC SEC. 742]); AND THERE ARE NO DECISIONS FROM THE SUPREME COURT ON THAT CRUCIAL LEGAL ISSUE; AND THIS CASE WAS ONE OF FIRST IMPRESSION IN THE NINTH CIRCUIT AS TO THAT CRUCIAL LEGAL ISSUE.

The opinion of the Court of Appeals below stated:

> "It is axiomatic that Congressional waiver of sovereign immunity is a prerequisite to any suit brought against the United States under admiralty law or otherwise.

"Recognizing this fact, the appellees rely upon the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq., as an expression of the governmental consent to be sued. The United States, however, contends that maritime claims against the Government arising under either the Death on the High Seas Act or the general maritime law are cognizable solely under two specific admiralty statutes, the Suits in Admiralty Act (SIA), 46 USC Sec. 741-742 and the Public Vessels Act, 46 USC Sec. 781-790."

* * * * *

"The District Court, believing that the admiralty statutes extended only to claims involving United States vessels or cargo concluded that the appellees' maritime claim was maintainable solely under the FTCA. Prior to 1960, this interpretation of the intersecting scope of the statutes would have been correct. However, in 1960, Congress amended Sec. 742 of the SIA by deleting the language which restricted the statute to claims involving merchant vessels and substituting a broad new jurisdictional statement:

> 'In cases where if such vessel were privately owned or operated, or such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in

personam may be brought against the United States . . . ."

The addition of the phrase 'or if a private person . . . were involved' has been interpreted by a majority of courts as a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA. (Citations of supporting and contrary authority follow.)

* * * *

"We therefore conclude that the Suits in Admiralty Act, as amended, encompasses aviation wrongful death actions against the United States arising under the general maritime law or under the Death on the High Seas Act. (Citations.) The necessary corollary is that the appellees' action is therefore not maintainable under the FTCA. (28 USC Sec. 2680(d)." Appendix A, pp. 8-9.

* * * *

Footnote 11 of the opinion of the Court of Appeals below states:

". . . While the appellees' claim arising out of the (subsequent rescue operations) is more readily classified as 'maritime' in nature, it still requires the pleading of an appropriate jurisdictional statute authorizing suit against the Government. Since we conclude that the SIA is the only statute proper in this instance, we hold

that the appellees' action based either upon the crash or upon the rescue operations is not maintainable under the FTCA." (Appendix A, p. 9).

* * * *

"While the result is harsh, it is well established that the limitations period in the Suits in Admiralty Act is jurisdictional in nature:" (Appendix A, p. 9).

* * * *

"We therefore conclude that to the extent that the appellees' claim is cognizable in admiralty, it is governed by the Suits in Admiralty Act and absolutely time-barred by Sec. 745 of that Act. The Government's motion to dismiss should have been granted. Reversed." (Appendix A, p. 10).

* * * *

The Court of Appeal below has acknowledged that the various lower courts are not in unanimous accord with the result reached by the Court of Appeals in this case. In 1968 it was pointed out in 2 Jayson Handling Federal Tort Claims, Sec. 257, that:

"It is no longer open to question that a maritime tort for which no remedy is provided either by the Suits in Admiralty Act or by the Public Vessels Act may be the basis of a claim under the Tort Claims Act. Thus, the United States may be

held liable under the Tort Claims Act for a drowning when a tug was caused to capsize on navigable waters; (Hess v. United States, 361 U.S. 314 [1960]; or for a civilian's death occurring when he bailed out of a military plane being negligently operated over international waters (Blumenthal v. United States, 306 F.2d 16 (3rd Circ., 1952); . . . or for negligence in connection with rescue operations at sea (United States v. DeVane, 306 F.2d 182 [5th Cir., 1962]; United States v. Gavagan, 280 F.2d 319 [5th Cir., 1960], certiorari denied 364 U.S. 933 [1961]); or for injuries sustained as the result of the absence of a guard rail by workmen repairing a lighthouse located on a breakwater (Gowdy v. United States, 271 F. Supp. 733 (W.D. 1967)" (Emphasis added).

The state of uncertainty that exists in this area of the law is cogently illustrated by a contention made by the Government in its Opening Brief in the Court of Appeals below in which the Government contended simultaneously that petitioners could not maintain their action under the Federal Tort Claims Act because their remedy was exclusively in admiralty; and to apparently cover itself against all possible contentions by petitioners, the Government's Opening Brief also includes the following diametrically opposite contention:

"The considerations behind Executive Jet underscore the inapplicability of admiralty law to the present case. Here, as

already mentioned, plaintiff alleges negligent conduct by Government air traffic controllers and Air Force personnel occurring on land at the Naha Air Base, Okinawa. The accident occurred, according to the amended complaint, 'while this aircraft was making an approach to landing at Naha Air Base, Okinawa' and this accident, like the one in Executive Jet, was 'only fortuitously and incidentally connected to navigable waters' and bore no 'significant relationship to traditional maritime activity.' This is not even a case of a mid-oceanic crash over which 'it could be argued' admiralty jurisdiction attached." (Government's Opening Brief, pp. 19-20).

The uncertainty as to whether any remedy existed in admiralty in favor of petitioners in this case, makes it manifestly unjust that petitioners have been made to suffer summary dismissal of their cause of action for wrongful death for simply having guessed wrong.

The Government's contention concerning the 1960 amendment to 46 USC Sec. 742, which was embraced by the Court of Appeals below, was summarily rejected in 1970 in J. W. Petersen Coal & Oil Company v. United States, 323 F. Supp. 1198 (N. D. -Ill., 1970), as follows:

"The Government concedes that before 1960 in cases not involving Government vessels it had not consented to be sued under the Suits in Admiralty Act and that

the Federal Tort Claims Act constituted the Government's waiver of sovereign immunity for maritime torts not involving Government vessels." (323 F. Supp. at p. 1203).

* * * *

"In 1960, Congress amended 46 USC Sec. 742. Therein the Government contends that by the inclusion of the words 'or if a private person or property were involved' Congress intended to include all maritime torts within the Suits in Admiralty Act and not just those involving vessels owned, possessed, or operated by or for the Government. . . . This court believes that the 1960 amendment had no such purpose.

* * * *

"That the 1960 amendment was not intended to change the requirement of a vessel 'owned by . . . or in possession of . . . or operated by or for the United States,' is supported by the immediate statutory context of the phrase in question. Van Dusen v. Barrack, 376 U.S. 612 (1964). The full title is Suits in Admiralty by or against Vessels or Cargoes of the United States. The amended 46 USC Sec. 742, itself, still speaks of suits being brought in the district 'in which the vessel or cargo charged with liability is found.' And 46 USC Sec. 740 speaks of presenting a claim to the 'agency owning or operating the

vessel' involved. . . . Petition of the United States, 216 F. Supp. 775 (D. Or. 1963) also supports the view that a Government vessel is still required. Based on the foregoing, the court concludes that unless the vessel was 'owned by . . . in the possession of . . . or operated by or for the United States' there is no remedy available under the Suits in Admiralty Act. If that be so, then there is no bar to an action under the Federal Tort Claims Act." (323 F. Supp. at pp. 1204-1205).

* * * * *

Petitioners respectfully submit that the granting of this writ is necessary to resolve the above conflict among the various lower courts which concerns the very issue on which this case was decided in the Court of Appeals below.

II

IN ITS RESOLUTION OF THE PURPORTED CONFLICT OF JURISDICTION BETWEEN THE FEDERAL TORT CLAIMS ACT AND THE SUITS IN ADMIRALTY ACT, AS SUCH CONFLICT RELATES TO AVIATION TORT CLAIMS ON NAVIGABLE WATERS, THE DECISION OF THE COURT OF APPEALS BELOW IS SQUARELY IN CONFLICT WITH THE HOLDING OF THE THIRD CIRCUIT IN BLUMENTHAL V. UNITED STATES, 306 F. 2ND 16 (3RD CIR. 1962), AFFIRMING THE OPINION OF THE DISTRICT COURT REPORTED AT 189 F. SUPP. 439 (E. D. -PA., 1960). RESOLUTION OF THAT CONFLICT BY THE SUPREME COURT IS NECESSARY IN THIS CASE.

Although the Blumenthal case, supra, was extensively briefed and argued by both parties, the opinion of the Court of Appeals below does not cite or mention the Blumenthal case at all. Blumenthal was an action for aviation wrongful death. None of the cases cited by the Court of Appeal below in support of its interpretation of the 1960 amendment to 46 USC Sec. 742, involved actions for aviation wrongful death, and none of those cited cases are from the Ninth Circuit.

In the Court of Appeals below, the government sought to distinguish the Blumenthal case solely on the basis that it was filed prior to

1960 (even though it was decided by the Third Circuit Court of Appeals in 1962). However, neither the Government nor the Court of Appeals has cited any cases that have distinguished or overruled the Blumenthal holding on the basis urged by the Government in this case.

To now reject the Blumenthal holding and apply such rejection retroactively to forever bar petitioners' cause of action for wrongful death is the very kind of "unforeseeable and retroactive" judicial construction of statutes which the Supreme Court rejected in Bouie v. City of Columbia, 378 U.S. 347 (1964).

In the Blumenthal case, supra, the Third Circuit held that in an action for aviation wrongful death brought against the United States under the Death on the High Seas Act, 46 USC Sec. 761 et seq., the absence of any involvement of a vessel of the United States dictated that plaintiff's cause of action must be pursued under the waiver of sovereign immunity provided by the Federal Tort Claims Act (28 USC Sec. 1346 [b]). The Third Circuit further stated that the absence of a vessel of the United States precluded invoking jurisdiction against the United States under the Public Vessels Act, 46 USC Sec. 781 et seq., or the Suits in Admiralty Act, 46 USC Sec. 741 et seq.

Obviously, the holding of the Third Circuit in the Blumenthal case, supra, is diametrically contrary to the holding of the Ninth Circuit in the case at bar. The Ninth Circuit has held in the case at bar that an action for aviation wrongful death against the United States

brought under the Death on the High Seas Act, must be based on the waiver of sovereign immunity contained in the Suits in Admiralty Act or the Public Vessels Act, notwithstanding that there was no public vessel of the United States involved in this case.

The District Court below, in denying the Government's motion to dismiss, stated:

> "I think where the Government is in error is that you're trying to rely on the Admiralty Section, which involves public vessels and we don't have a suit against public vessels here."

The Supreme Court has held that a privately-owned ship operating on a war mission for the United States was employed as a merchant vessel, and not as a public vessel subject to the Public Vessels Act. Calmar S.S. Corporation v. United States, 345 U.S. 446 (1953).

Another post-1960 aviation wrongful death case which reached a holding contrary to that of the Court of Appeals below is Kropp v. Douglas Aircraft Company, 329 F. Supp. 447 (E.D.-N.Y., 1971), in which the District Court stated that:

> "Suits maintainable against the private person based on the Death on the High Seas Act may similarly be brought against the Government by virtue of the Federal Tort Claims Act. . . unless the suit comes within the exceptions to the Act, as to which the Government does not

waive its sovereign immunity." (329 F. Supp. at p. 455).

Your petitioners respectfully pray that this Court issue its Writ of Certiorari to resolve the above described conflict among the lower courts.

III

AS THE OPINION OF THE COURT OF APPEALS BELOW HAS STATED, THIS CASE RAISES THE VERY ISSUE WHICH THE SUPREME COURT EXPRESSLY LEFT UNANSWERED IN EXECUTIVE JET AVIATION, INC. V. CITY OF CLEVELAND. 409 U.S. 249 (1972), (I.E., WHETHER AN AVIATION TORT CLAIM IS COGNIZABLE UNDER MARITIME LAW, WHERE THE AVIATION ACCIDENT OCCURS DURING A TRANSOCEANIC FLIGHT).

As noted earlier, the Government contended in the Court of Appeal below that this accident "bore no significant relationship to traditional maritime activity," and that "this is not even a case of a mid-oceanic crash over which it could be argued admiralty jurisdiction attached." (Government's Opening Brief, p. 20).

Concerning the Executive Jet issue in this case, the Court of Appeals below stated:

"The District Court . . . concluded that it had jurisdiction to entertain appellees'

suit as a maritime wrongful death action under the FTCA. This appeal invites an examination of whether, under the circumstances shown here, an aviation tort claim is cognizable under maritime law." (Appendix A, pp. 2-3).

* * * *

"As far as the general maritime law is concerned, Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) is necessarily the starting point in any effort to define a 'maritime tort' in the aviation context." (Appendix A, p. 3).

* * * *

"(In Executive Jet) the Supreme Court thus expressly reserved the question which is before us now." (Appendix A, p. 5).

* * * *

"More significantly, the transoceanic transportation of cargo is an activity which is readily analogized with 'traditional maritime activity.' Indeed, before the advent of aviation, such shipping could only be performed by waterborne vessels. We therefore do not interpret Executive Jet, supra, as precluding a maritime action on the facts of this case." (Appendix A, p. 5).

* * * *

This case also presents for interpretation by the Supreme Court the issue of whether a cause of action for wrongful death occurring in navigable waters, can be asserted as a commonlaw cause of action for wrongful death (Moragne v. States Marine Lines, Inc., 398 U.S. 375 [1970]), and if so, is such a cause of action properly asserted against the United States pursuant to the waiver of sovereign immunity in the Federal Tort Claims Act? There are no cases from the Supreme Court to provide guidance to the lower courts or to the Bar on that issue. The difficult nature of that issue focuses sharply in this case, particularly with respect to petitioners' cause of action based on the negligent failure of the Air Force personnel to rescue petitioners' decedent from the navigable waters.

IV

THE DECISION OF THE COURT OF APPEALS BELOW RAISES A VERY SIGNIFICANT ISSUE OF FEDERAL STATUTORY CONSTRUCTION WHICH REQUIRES RESOLUTION BY THE SUPREME COURT, PARTICULARLY TO THE EXTENT THAT THE COURT OF APPEALS' DECISION CONSTITUTES A HOLDING THAT THE 1960 AMENDMENT TO 46 USC SEC. 742 WAS A REPEAL BY IMPLICATION OF THE PRE-1960 CONSENT OF THE UNITED STATES THAT HAD PERMITTED MARITIME WRONGFUL DEATH ACTIONS TO BE MAINTAINED AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT.

The Court of Appeals below held that by its 1960 amendment to 46 USC Sec. 742, Congress repealed the pre-1960 consent of the United States to be sued under the FTCA for maritime wrongful death. However, the legislative history of the 1960 amendment reveals no intent by Congress to repeal or affirmatively withdraw any previous consent to be sued. On the contrary, all of the legislative history cited by the Government and by the Court of Appeals below, demonstrates an intent by Congress to broaden the jurisdictional bases for asserting maritime claims.

Petitioners contend that where the sovereign has previously consented to being

sued for maritime wrongful death under the Federal Tort Claims Act, any repeal or affirmative withdrawal of that consent must be manifested in clear, concise, and unambiguous statutory language. Petitioners further contend that such a repeal or affirmative withdrawal of the consent of the sovereign to be sued for maritime wrongful death under the FTCA cannot be accomplished by judicial construction of statutory language which lends itself to several interpretations by reasonable judges and attorneys.

The Supreme Court has held that the cardinal rule is that statutory repeals by implication are not favored. Jones v. Alfred H. Mayer Company, 392 U.S. 409 (1968). If a statutory repeal by implication is found by a court, the intention of the legislature to repeal the statute must be clear and manifest, and it is not sufficient to establish merely that the subsequent law covers some or all of the cases provided for by the prior statute. Instead it is essential that there be a positive repugnancy between the provisions of the new law and the provisions of the old law. Rosenberg v. United States, 346 U.S. 273 (1953), reconsideration denied, 346 U.S. 324.

When a repeal by implication is relied on, it must be impossible for both statutory provisions under consideration to stand because one necessarily destroys the other. Wilmot v. Mudge, 103 U.S. 217 (1880). Repeals of statutes by implication are unfavored unless the implication is so clear as to be equivalent

to an explicit declaration, and every doubt should be resolved against such a construction. Osborn v. Nicholson, 80 U.S. 654 (1871).

In the case at bar, the finding of a repeal by implication of the prior waiver of sovereign immunity by the United States to have maritime tort claims prosecuted under the Federal Tort Claims Act is certainly not clear, and is not necessary in that said implication creates a conflict in jurisdiction. The judicial finding of a repeal by implication can hardly be considered irresistible since several District Courts have thus far managed to resist, as well as the Third Circuit Court of Appeals. It can hardly be said that such a repeal by implication is free from reasonable doubt.

Again, since an obvious conflict exists among the lower courts, clarification of this uncertainty by the Supreme Court is necessary for the benefit of the lower courts and the Bar.

V

THE DECISION OF THE COURT OF APPEALS BELOW (WHICH INTERPRETS THE INTENT OF CONGRESS IN ENACTING THE 1960 AMENDMENT TO 46 USC SEC. 742), HAS CAUSED A MOST SIGNIFICANT FEDERAL CONSTITUTIONAL ISSUE TO BE PRESENTED, WHICH IS WHETHER THE LANGUAGE CONTAINED IN 46 USC SEC. 742 VIOLATES FEDERAL CONSTITUTIONAL STANDARDS OF VAGUENESS AND FAIR WARNING.

If (as the Court of Appeals below has held in this case) the 1960 amendment to 46 USC Sec. 742 did constitute a repeal and revocation of the United States' pre-1960 consent to having maritime wrongful death claims asserted under the Federal Tort Claims Act; -- the language used by Congress in 46 USC Sec. 742 to manifest such a repeal is violative of Federal Constitutional standards of vagueness and fair warning. By reason of the vagueness of said Sec. 742 and the lack of fair warning accorded to petitioners thereby, petitioners have been deprived of a valuable property right (to wit: a vested cause of action for wrongful death), without due process of law.

In its application to this case, the interpretation of the 1960 amendment to 46 USC Sec. 742 urged by the Government and accepted by the Court of Appeals below, cannot be reconciled with the Constitutional standard that

Congress, when it enacts statutes, must afford every person affected by the statute a "right of fair warning" which may not be abrogated by vague statutory language. Bouie v. City of Columbia, 378 U.S. 347 (1964).

If the intent of Congress (when Congress enacted the 1960 amendment to 46 USC Sec. 742) had been to impose new jurisdictional restrictions upon the maintenance of actions for maritime torts, it is preposterous to believe that Congress could have manifested such a delimiting intent by adding to the amended statute the words "any appropriate nonjury proceeding in personam may be brought against the United States . . ."

Both the Government and the Court of Appeals below have acknowledged that prior to 1960, proceeding under the Federal Tort Claims Act was "an appropriate nonjury proceeding" for maintaining a maritime wrongful death action against the United States. It is inconceivable that the insertion of the words "any appropriate nonjury proceeding in personam may be brought against the United States . . ." into the amended Sec. 742, could be intended by Congress as meaning that the Federal Tort Claims Act was to become an inappropriate nonjury proceeding for maintaining a maritime tort claim against the United States.

Neither the Government nor the Court of Appeals below have come to grips with the meaning to be attributed to the words "any

appropriate nonjury proceeding in personam may be brought against the United States . . ." which are found in the 1960 amendment to 46 USC Sec. 742.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Supreme Court stated:

> ". . . A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (378 U.S. at p. 351)
>
> * * * *
>
> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." (378 U.S. at p. 352).

In 1931, Justice Holmes wrote: ". . . It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 25 (1931).

If by its 1960 amendment to 46 USC Sec. 742, Congress did actually intend to transform a previously appropriate nonjury proceeding

(the FTCA) into an inappropriate nonjury proceeding for the maintenance of maritime tort claims against the United States, the language chosen by Congress to manifest such intent is hopelessly violative of the above described Constitutional standard articulated by the Supreme Court.

The position asserted by the Government and upheld by the Court of Appeals below leads to the conclusion that the words "any appropriate nonjury proceeding in personam may be brought against the United States . . ." (which are found in the amended 46 USC Sec. 742), actually must be taken to mean "only a proceeding in admiralty may be brought against the United States." Petitioners respectfully submit that if Congress had intended such a meaning, the lawmakers could have and should have found the proper words to express such a meaning.

In the case at bar, the United States Government is attempting to escape liability for a tort claim for wrongful death, and is using as its means of escape the obviously ambiguous, unclear, and confusing statutory language drafted into law by the United States Government, acting through Congress.

Under such circumstances, wherein defendant is the party which drafted confusing language on which it bases its escape from liability, the court should examine the merits of such a defendant's contentions from the same posture from which the courts examine confusing and ambiguous clauses contained in

insurance policies. The Supreme Court has held that an ambiguity in an insurance policy must be construed in favor of indemnity and against a forfeiture. McMaster v. New York Life Insurance Company, 183 U.S. 25 (1901). In the time-honored case of United States v. Heth, 7 U.S. 399 (1806), Justice Cushing wrote: "The words of a statute, if dubious, ought in cases of the present kind, to be taken most strongly against the lawmakers." (7 U.S. at p. 413).

In Bouie v. City of Columbia, supra, the Supreme Court held that if a violation of due process of law has been perpetrated by reason of a vague statute, ". . . the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." (378 U.S. at p. 352).

Although many of the leading cases dealing with unconstitutionally vague statutes were criminal or quasi-criminal statutes, the Supreme Court has recognized the need for application of the same Constitutional standards to civil statutes. In Lambert v. People of the State of California, 355 U.S. 225 (1957), the Supreme Court, per Mr. Justice Douglas, stated:

> "Engrained in our concept of due process is the requirement of notice . . . . Notice is required before property interests are disturbed, before assessments are made,

before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306; Covey v. Town of Somers, 351 U.S. 141; Walker v. City of Hutchinson, 352 U.S. 112. These cases involved only property interests in civil litigation." (355 U.S. at p. 228).

Concerning the nature of the property rights of which petitioners have been summarily deprived in this case without due process of law, the Supreme Court has held that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Pritchard v. Norton, 106 U.S. 124, 132 (1882).

The admitted existence of the pre-1960 consent by the United States to the assertion of maritime tort claims against the sovereign under the Federal Tort Claims Act, placed an affirmative duty upon the United States Government to give clear and fair warning to the citizenry that they would be required to assert such claims under different rules of law and jurisdictional procedures after 1960. Congress gave no such warning to the citizenry, and the existence of any such changes in the jurisdictional procedures for asserting such claim, have been established only by judicial legislation. It certainly cannot be reasonably contended that the United States Government gave such "clear and fair warning to the

citizenry" by the obviously ambiguous amendment to 46 USC Sec. 742.

Petitioners respectfully request that this Court issue its Writ of Certiorari to examine the constitutionality of 46 USC Sec. 742 as amended in 1960.

VI

A JUDICIAL DEFINITION BY THE SUPREME COURT IS NEEDED OF THE WORD "STATE" CONTAINED IN THE DEATH ON THE HIGH SEAS ACT (46 USC SEC. 761 ET SEQ.). THIS CASE PRESENTS THAT ISSUE FOR DETERMINATION.

In the case at Bar, the Complaint alleges that the subject crash occurred 1500 to 1900 feet off the shore of Okinawa (which is less than one marine league from Okinawa but much more than one marine league from the shores of any State, territory or dependency of the United States).

On this particular issue, the Death on the High Seas Act (46 USC Sec. 761) provides that the jurisdiction of the Act is limited to the death of a person "occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the territories or dependencies of the United States . . ."

In Moragne v. States Marine Lines, Inc., supra, the Supreme Court held that when death occurs within the territorial waters of a State of the United States, the Death on the High Seas Act does not apply, but a commonlaw cause of action for wrongful death can be maintained. This of course raises the issue of what law applies when death occurs within the territorial waters of a foreign country?

In Panama Railroad v. Napier Shipping Company, 166 U.S. 280 (1897), the Supreme Court held that the fact that a cause of action arose in the waters of a foreign port is immaterial, and held that the law is well settled both in England and the United States that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.

The above principle established in the Panama Railroad case, supra, was further extended in Galef v. United States, 25 F. 2d 134 (D.C.-S.C. 1928) which held that the jurisdiction of maritime courts of the United States extend to maritime torts committed in the ports of harbors and territorial waters of foreign powers (independent of foreign law), and that such torts will be redressed in American maritime courts by virtue of the maritime law as accepted by this country.

In Wynne v. United States, 217 U.S. 234 (1910), the Supreme Court was confronted with an issue of interpretation of the word "State," in regard to a criminal statute. The Supreme Court there held that the word "State"

applies to States of the United States, and not to any separate particular community.

In the case at Bar, petitioners submit that the Death on the High Seas Act provides a remedy against the United States, irrespective of whether the plane crashed within or without one marine league from the shore of Okinawa. That such a cause of action can be asserted under the Federal Tort Claims Act is supported by Blumenthal v. United States, 306 F. 2d 16 (1962); and Moran v. United States, 102 F. Supp. 275 (Conn. 1951).

VII

INTERVENTION BY THE SUPREME COURT IS NECESSARY IN THIS CASE TO PREVENT THE COURT OF APPEALS' ADMITTEDLY "HARSH RESULT" FROM PERPETRATING A MANIFEST MISCARRIAGE OF JUSTICE UPON PETITIONERS.

The opinion of the Court of Appeals below admits to having reached a "harsh result" in this case. Under the unusual circumstances here presented, such an admittedly "harsh result" cannot be reconciled with the Supreme Court's admonition that civil courts must adhere to "traditional notions of fair play and substantial justice implicit in due process." Milliken v. Meyer, 311 U.S. 457 (1940).

In United States v. Pennsylvania Chemical Corporation, 411 U.S. 655 (1973), the Supreme

Court held that the United States Government could not penalize a corporation where the court found that the defendant corporation had been "affirmatively misled" by the Government's prior rulings, interpretations, and opinions. The Supreme Court held that to the extent that the Government's regulations deprived the defendant corporation of fair warning as to what conduct was prohibited, there could be no doubt that "traditional notions of fairness" prevent the Government from proceeding with a prosecution.

In the case at Bar, the sovereign's pre-1960 consent to having maritime tort claims asserted against it under the FTCA, constituted a body of experience and informed judgment to which it was proper for attorneys to resort for guidance, particularly by refernce to the holdings in Moran v. United States, 102 F. Supp. 275 (Conn. 1951); and Blumenthal v. United States, 306 F. 2d 16 (3rd Cir., 1962).

It is important to note that in United States v. Pennsylvania Chemical Corporation, supra, the Supreme Court based its decision on "traditional notions of fairness" and not on Constitutional due process grounds.

Application of "traditional notions of fairness" in the present case, would tend to require that the unexpected holding of the Court of Appeals below cannot be applied retroactively to summarily bar petitioners' claims for wrongful death.

VIII

THE RECURRING NATURE OF THE ISSUES HEREIN PRESENTED (CONCERNING AVIATION TORT CLAIMS) CAUSES THOSE ISSUES TO ASSUME ENORMOUS GENERAL IMPORTANCE DUE TO THE CONTINUOUS EXPANSION OF AVIATION ACTIVITIES ON AN INTERNATIONAL SCOPE. RESOLUTION OF CRUCIAL LEGAL ISSUES THAT HAVE THUS FAR GONE UNRESOLVED BY THE SUPREME COURT, IS NECESSARY FOR THE BENEFIT OF ALL LOWER COURTS, THE BAR, AND THE AVIATION INDUSTRY.

With the literal explosion of air passenger miles traveled in recent years, it is readily foreseeable that more plane crashes on navigable waters will be occurring in future years which could subject the United States to liability for aviation torts. Thus the confusing jurisdictional issues herein presented must be resolved by the Supreme Court of the United States to provide the Bench and Bar with adequate methods for handling cases.

At the present time, the Bench and Bar do not have a clear and decisive mandate from the Supreme Court as to whether an aviation death case on navigable waters should be brought against the United States under FTCA, or under the Suits in Admiralty Act. If such a determination is left to the lower trial courts or lower appellate courts to determine on a

case-by-case basis, serious injustices could result by reason of the disparity in the statutes of limitation under the two procedures.

It should not be a policy of the Federal courts to dispose of litigation merely upon confusing and ambiguous statutes on jurisdiction and procedural matters. Basic fairness demands that a definite statement be issued by the Supreme Court clarifying this serious jurisdictional and procedural dilemma that now exists on matters involving maritime tort claims against the United States.

For the above reasons, the decision of the Court of Appeals in the instant case raises questions of general and continuing importance in the prosecution of Federal tort and maritime actions against the United States. Petitioners respectfully submit that it is in the public interest that the Supreme Court establish viable and consistent doctrines concerning jurisdiction and procedures on such matters.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 6, 1974 (rehearing denied July 9, 1974), in Ninth Circuit Case No. 73-2260.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CAROLYN ROBERTS, Individually, and STACY ROBERTS, GAIL ROBERTS and MATTHEW ROBERTS, by CAROLYN ROBERTS, their Guardian ad Litem,

Plaintiff-Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

No. 73-2260

[June 6, 1974]

Appeal from the United States District Court
from the Central District of California

Before: ELY, HUFSTEDLER and TRASK,
Circuit Judges

TRASK, Circuit Judge:

The United States appeals from an order denying its motion for dismissal of the appellees' complaint. Because the motion raised a close jurisdictional question the District Court certified its order for an interlocutory appeal under 28 U.S.C. § 1292(b). The United States filed an application in this court to prosecute that appeal and we granted the application. Upon review of the applicable authorities we conclude that the court erroneously denied the Government's motion to dismiss.

This is a wrongful death action arsing out of the crash of a Flying Tiger Lines cargo plane on July 27, 1970. The plane was approaching the Naha Air Base, Okinawa, for a ground controlled landing when it crashed in navigable waters 1500 to 1900 feet short of the runway. Charging that United States Air Force personnel negligently directed the landing and subsequent rescue

operations, the widow and three minor children of the plane's navigator (appellees) filed suit against the United States on November 21, 1972.[1] Their original complaint was brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, and sought $2,500,000 damages for wrongful death. The United States, however, successfully argued that because the tort was alleged to have occurred in Okinawa, the action was therefore barred by section 2680(k) of the FTCA which excludes "[a]ny claim arising in a foreign country." The District Court accordingly dismissed the suit but granted the appellees leave to amend.

In their subsequently amended complaint the appellees relied upon the same basic facts but stated them somewhat differently. The first cause of action was still based upon the FTCA. However, instead of alleging that the events occurred "at or near Naha Air Base, Okinawa, Ryukyu Islands" which would open the claim to the "foreign country" exclusion of section 2680(k) the complaint alleged that the events occurred "while the aircraft was making an approach to landing . . . over the high seas crashing into navigable waters . . . ." Thus, the claim was asserted to be "maritime." A second cause of action was asserted as a "Maritime Wrongful Death" under the general admiralty and maritime jurisdiction, Fed. R. Civ. P. 9(h), and a third cause of action was alleged under the "Death on the High Seas Act," 46 U.S.C. §§ 761-767.

The specific acts of negligence relied upon were the same as to each of the three claims: that the United States negligently directed the landing of the aircraft and the subsequent rescue operations of its passengers.

The United States again moved to dismiss the action, arguing that the aviation crash did not give rise to a maritime claim. Secondarily, the Government contended that even if maritime jurisdiction were appropriate, the appellees' suit against the United States was cognizable solely under the Suits in Admiralty Act (SIA), 46 U.S.C. §§ 741-752, and not the FTCA as averred. The District Court rejected both of these arguments and concluded

[1] An administrative claim was filed on July 26, 1972, and rejected by the appropriate Federal agency on August 22, 1972.

that it had jurisdiction to entertain the appellees' suit as a maritime wrongful death action under the FTCA.

This appeal invites an examination of whether, under the circumstances shown here, an aviation tort claim is cognizable under maritime law. Preliminarily we note that if viewed as stating a "land" rather than a "maritime" tort, the appellees' complaint under the FTCA is indeed barred by 28 U.S.C. § 2680(k). *See United States v. Spelar*, 338 U.S. 217 (1949).[2] To therefore shift the locus of their claim from land to sea, the appellees rely upon two independent sources: the general maritime law, and a specific federal statute, the Death on the High Seas Act, 46 U.S.C. §§ 761-768.

As far as the general maritime law is concerned, *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) is necessarily the starting point in any effort to define a "maritime tort" in the aviation context. In *Executive Jet* the Supreme Court rejected the traditional locality test which found maritime jurisdiction whenever a tort occurred in navigable waters.[3] A literal

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[2]Under the FTCA, a tort claim arises at the place where the negligent act or omission occurred and not where the negligence had its "operative effect," (*i.e.*, the situs of injury). Richards v. United States, 369 U.S. 1 (1962). An American military base located on foreign soil is fully within the foreign country exception (section 2680(k)), United States v. Spelar, 338 U.S. 217 (1949), and this court has previously classified Okinawa as a foreign country for the purposes of the FTCA, Cobb v. United States, 191 F.2d 604 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

The *Cobb* classification was based upon the status of Okinawa as of 1949. We note that on May 15, 1972, after the cause of action in this suit arose, the island was returned to the empire of Japan. 23 U.S.T., Part 1 at 447.

[3]A classic statement of the locality test appears in The Plymouth, 3 Wall. 20, 36 (1855); "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The durability of this test is reflected by the fact that the Supreme Court approvingly applied the locality standard in the term immediately prior to the *Executive Jet* decision. Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971).

A distinct problem is the determination of where an aviation tort "occurs." Unlike the rule developed under the Federal Tort Claims Act, *see supra*, n.2, in applying the maritime locality test a tort is deemed to occur not where the wrongful act or omission had its inception, but at the place where it became operative, *i.e.*, place of injury. Oppen v. Aetna

application of this test over the years had brought aviation tort cases within admiralty jurisdiction depending, of course, upon where the aircraft crashed.[4] However, in *Executive Jet* the Supreme Court criticized the fortuity of this jurisdictional classification and announced a new twofold test for determining whether a maritime tort was pleaded. The Court retained the navigable waters locality prerequisite but added a maritime "nexus" requirement:

> ". . . [W]e conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.' It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268.

The maritime claims asserted in *Executive Jet* arose from the crash of a chartered jet en route from Cleveland, Ohio to Portland, Maine. The aircraft struck and ingested a flock of seagulls on takeoff and crashed in the navigable waters of Lake Erie. The Supreme Court had little difficulty in concluding that "a flight that would have been almost entirely over land and within the continental United States" bore an insufficient relationship with traditional maritime activity. However, the Court declined to generalize as to other aviation tort contexts, commenting instead:

> "We need not decide today whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction in the absence of legislation. It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear

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Insurance Co., 485 F.2d 252, 256 (9th Cir. 1973); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Wilson v. Transocean Airlines, 121 F. Supp. 85, 92 (N.D. Cal. 1954). The Supreme Court in *Executive Jet, supra*, discussed the difficulties inherent in determining tort locus in the aviation context, but the Court did not propose another test. *Id.* at 266-68.

[4] *See Executive Jet, supra* at 264, n.14.

> a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by water-borne vessels." *Id.* at 271.

The Supreme Court thus expressly reserved the question which is before us now.[5]

An examination of the record provides several bases for distinguishing the air accident in this case from the crash which occurred in *Executive Jet*. According to the appellees' amended complaint, the Flying Tiger Lines aircraft was engaged in transporting cargo between Los Angeles and Viet Nam; Okinawa was merely one of a number of intermediate stopping points. Geographic realities, therefore, do not make the cargo plane's contact with navigable waters entirely "fortuitous." More significantly, the transoceanic transportation of cargo is an activity which is readily analogized with "traditional maritime activity." Indeed, before the advent of aviation, such shipping could only be performed by waterborne vessels. We therefore do not interpret *Executive Jet, supra*, as precluding a maritime action on the facts of this case.

The appellees' alternate reliance upon the Death on the High Seas Act (DOHSA), 26 U.S.C. §§ 761-768, is more questionable. Although the Supreme Court has explicitly sanctioned the bringing of aviation wrongful death cases under a literal construction of the DOHSA,[6] the facts alleged in the appellees' own brief cast

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[5]We find little assistance in the post-*Executive Jet* cases, as none have involved claims arising from a transoceanic aviation accident. *E.g.*, Teachey v. United States, 363 F. Supp. 1197 (M.D. Fla. 1973) (helicopter crash during a land shuttle); Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973) (helicopter crash during performance of activities identical to those performed by crew boats); Hawk v. Antilles Airboats, Inc., 355 F. Supp. 683 (D.C. Virgin Islands 1973) (crash of a seaplane).

[6]"Indeed, it may be settled today that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful-death actions.

* * *

"Of course, under the Death on the High Seas Act, a wrongful death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court." Executive Jet, *supra* at 263-64, 271, n.20.

doubt upon the statute's applicability. The appellees concede that the alleged tort occurred a maximum of 1900 feet from the Okinawa shore, *i.e., in presumably foreign territorial waters.* In view of the somewhat ambiguous language of the statute itself and the apparent lack of authority on the point, we hesitate to conclude whether a tort occurring within foreign territorial waters comes within the purview of the Death on the High Seas Act.[7]

However, we find it unnecessary to resolve this question since our acceptance of appellees' maritime tort designation on either this or *Executive Jet* ground would require recognition of another jurisdictional obstacle prohibiting this suit.

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[7]The Act itself reads:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, § 1, 41 Stat. 537." 46 U.S.C. § 761.

While a distance of 1900 feet from shore would almost certainly be within a foreign state's territorial waters, we have noted that some foreign states have extended their territorial waters for fishing purposes to much greater distances than "one marine league." (Approximately 3 nautical miles.) Because Congress only has power to fix the extent of territorial waters measured from the shores of its own country it may well have considered all waters beyond one marine league from those shores to be "high seas" for purposes of DOHSA so long as navigable, even though within the territorial waters of a foreign state.

Relatedly, a law review article discussing the Act observes:

> "In addition, it is not clear whether the DHSA would have application when the accident occurs on territorial waters of a foreign country. Nevertheless, the scope of general admiralty jurisdiction clearly extends to such cases, and presumably the scope of the DHSA would be the same except in the areas where it is expressly not applicable." 51 Cal.L.Rev. 389, 397 (1963).

For a discussion of the meaning of the term "high seas" *see* United States v. Flores, 289 U.S. 137 (1933) and United States v. Rodgers, 150 U.S. 249 (1893). *But see* United States v. Ross, 439 F.2d 1355, 1357 (9th Cir. 1971).

It is axiomatic that Congressional waiver of sovereign immunity is a prerequisite to any suit brought against the United States under admiralty law or otherwise. Recognizing this fact, the appellees rely upon the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, as an expression of governmental consent to be sued.[8] The United States, however, contends that maritime claims against the Government arising under either the Death on the High Seas Act or the general maritime law are cognizable solely under two specific federal admiralty statutes, the Suits in Admiralty Act (SIA), 46 U.S.C. §§ 741-752 and the Public Vessels Act, 46 U.S.C. §§ 781-790. Neither side disputes the fact that jurisdiction under the FTCA and the two admiralty statutes is mutually exclusive, 28 U.S.C. § 2680(d).

The District Court, believing that the admiralty statutes extended only to claims involving United States vessels or cargo concluded that the appellees' maritime claim was maintainable solely under the FTCA. Prior to 1960, this interpretation of the intersecting scope of the statutes would have been correct.[9] However, in 1960, Congress amended section 742 of the SIA by deleting the language which restricted the statute to claims involving merchant vessels[10] and by substituting a broad new jurisdictional statement:

> "In cases where if such vessel were privately owned or operated, or such cargo were privately owned or possessed, *or if*

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[8]The appellees appear to argue that the Death on the High Seas Act constitutes an independent jurisdictional base. See Appellees' Brief at 2. However, this is clearly not the case. The DOHSA merely creates a cause of action for wrongful maritime death where none previously existed; the act does not contain any provision waiving sovereign immunity. A suit against the United States brought under the DOHSA still requires the pleading of a separate federal statute authorizing suit against the government. *See e.g.*, Allen v. United States, 338 F.2d 160 (9th Cir. 1964); 51 Cal.L.Rev. 389 (1963).

[9]*See e.g.*, Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951), and the discussion in De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971).

[10]Prior to the 1960 amendment, section 742 read as originally enacted: "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of

> *a private person* or property *were involved*, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . ." Pub. L. No. 86-770, § 3, 74 Stat. 912. (Emphasis added)

The addition of the phrase "or if a private person . . . were involved" has been interpreted by a majority of courts as a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA. *See De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971); *Richmond Marine Panama, S.A. v. United States*, 350 F. Supp. 1210, 1219-1220 (S.D.N.Y. 1972); *Tankadorial Gefion A/S v. United States*, 241 F. Supp. 83 (E.D. Mich. 1964); *Contra, J. W. Peterson Coal & Oil Co. v. United States*, 323 F. Supp. 1198 (N.D. Ill. 1970). Moreover, this expanded interpretation of the SIA appears to conform with retrospective Congressional understanding of the Act, as the court in *Richmond Marine Panama, S.A. v. United States, supra*, notes:

> "Although *subsequent* Congressional explanation of the meaning of a statute is not binding on the courts, it is interesting to note, nevertheless, that a Senate Report of August 17, 1972 explained that the 1960 amendment extends jurisdiction under the Suits in Admiralty Act 'to the full range of admiralty cases which might have been maintained had a private person or property been involved rather than the Government or its agents and employees or property.' Senate Report No. 92-1079, 92d Cong., 2d Sess., 1972, 9 U.S. Code Cong. and Admin. News, pp. 4045, 4050." *Id.* at 1220, note.

We therefore conclude that the Suits in Admiralty Act, as amended, encompasses aviation wrongful death actions against the United States arising under the general maritime law or under the Death on the High Seas Act. *See Allen v. United States*, 338 F.2d 160 (9th Cir. 1964) (Text accompanying n.2.) The neces-

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> the action herein provided for, a libel in personam may be brought against the United States or against any corporation . . . as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation . . . ."

sary corollary is that the appellees action is therefore not maintainable under the FTCA. 28 U.S.C. § 2680(d).[11]

Finally, in anticipation of an adverse resolution of these issues, the appellees request a second opportunity to amend their complaint in conformity with the court's jurisdictional conclusions. Appellees further contend that such an amendment should "relate back" so as to avoid the time bar of the two year limitations period contained in the Suits in Admiralty Act, 46 U.S.C. § 745. In support of this request the appellees cite *Becker v. United States*, 338 F.2d 687 (3d Cir. 1964), and other cases erroneously brought under the FTCA in which a transfer to admiralty was allowed.

However, the appellees' situation is distinguishable from the precedent they cite in that the appellees' *original complaint* was not filed until *after* the two year SIA limitations period had already expired. Since any amendment filed now can only refer back to the date when the appellees' original complaint was filed, Fed. R. Civ. P. 15(c), the "relation back" argument cannot save this action from the operation of section 745.[12] While the result is harsh, it is well established that the limitations period in the Suits in Admiralty Act is jurisdictional in nature:

> "The two year time-bar of the Suits in Admiralty Act is unlike a time-bar period prescribed under an ordinary Statute of Limitations. Under an ordinary time-bar statute a claim is not extinguished after the statutory period has elapsed. It is only unenforceable. The time-bar of the Suits in Admiralty Act renders a claim against the United States

[11] Although somewhat blurred in the pleadings, the appellees attempt to distinguish the events which produced the air crash from the subsequent rescue operations. While the appellees' claim arising out of the latter activity is more readily classified as "maritime" in nature, it still requires the pleading of an appropriate jurisdictional statute authorizing suit against the government. Since we conclude that the SIA is the only statute proper in this instance, we hold that the appellees' action based either upon the crash or upon the rescue operations is not maintainable under the FTCA.

[12] Under the Suits in Admiralty Act the two year statute of limitations begins to run from the date of injury rather than the date of denial of an administrative claim. McMahon v. United States, 342 U.S. 25 (1951); Kindrew v. United States, 479 F.2d 39 (5th Cir. 1973).

> not only unenforceable, but extinguishes the claim itself, for when the sovereign, immune from suit, consented to be sued it was made a condition of the right to sue that suits so authorized had to be brought within the time-bar period."

States Marine Corp. v. United States, 283 F.2d 776, 778 (2d Cir. 1960). *See also McMahon v. United States*, 342 U.S. 25 (1951). Neither infancy nor any other disability can toll the running of this statute. *Sgambati v. United States*, 172 F.2d 297 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949). *Accord*, *Williams v. United States*, 133 F. Supp. 319 (E.D. Va. 1954), *aff'd*, 228 F.2d 129 (4th Cir. 1955), *cert. denied*, 351 U.S. 986 (1956).[13]

We therefore conclude that to the extent that the appellees' claim is cognizable in admiralty, it is governed by the Suits in Admiralty Act and absolutely time-barred by § 745 of that Act. The Government's motion to dismiss should have been granted.

Reversed.

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[13]In similar vein this court has held that the institution of a suit under the FTCA within the statutory period of limitation is a jurisdictional requirement, and that the limitation period is not tolled during minority. Mann v. United States, 399 F.2d 672 (9th Cir. 1968); Brown v. United States, 353 F.2d 578 (9th Cir. 1965). Indeed, appellees do not contest the point here.

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 72-2784-EC- Date April 30, 1973

Title Carolyn Roberts, etal -v- U. S. A.

Docket Entry Ent procs hrg & denying deft's motion to dismiss 1st amended complaint. Ent ord deft 20 days to file an answer.

PRESENT:
HON. E. AVERY CRARY, JUDGE

Wayne E. Payne — Deputy Clerk
Virginia Wright — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Ian Herzog

ATTORNEYS PRESENT FOR DEFENDANTS:
Larry Dier for James Stotter
Ass't. U. S. Attorney

PROCEEDINGS: HEARING Defendant's Motion to Dismiss First Amended Complaint:

Counsel presente as shown and argue the motion.

Court denied defendant's motion to dismiss the first amended complaint.

Court permits defendants 20 days in which to file an answer.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLYN ROBERTS, individually, and STACY ROBERTS, GAIL ROBERTS and MATTHEW ROBERTS, by Carolyn Roberts, their Guardian ad Litem,	)	No. 72-2784-EC
Plaintiffs,	)	ORDER AMENDING ORDER DENYING MOTION TO DISMISS.
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

The interlocutory order of this Court entered April 30, 1973, denying the motion of the defendant United States to dismiss plaintiffs' amended complaint for lack of jurisdiction (motion for reconsideration denied June 4, 1973), is hereby amended to include the statements required by Title 28, U.S.C. §1292(b), and Rule 5(a), Federal Rules of Appellate Procedure, necessary for a petition for permission to appeal.

IT IS ORDERED that the Order denying the defendant's motion to dismiss, entered April 30, 1973, is hereby amended to include the

following:

> This Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and, an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

IT IS FURTHER ORDERED that the above described Order, as hereby amended, shall be deemed entered as of the date of this Order for purposes of computing the allowable time for the filing of a petition for permission to appeal, and for this purpose only.

DATED: June 12, 1973.

/s/ E. Avery Crary
E. AVERY CRARY
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROLYN ROBERTS, Individually, and STACY ROBERTS, GAIL ROBERTS and MATTHEW ROBERTS, by CAROLYN ROBERTS, their Guardian ad Litem,	)	FILED July 9, 1974
Plaintiffs-Appellees,	)	
vs.	)	No. 73-2260
UNITED STATES OF AMERICA,	)	
Defendant-Appellant.	)	

Before: ELY, HUFSTEDLER and TRASK, Circuit Judges

O R D E R

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge

of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

TEXTS OF STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Fifth Amendment, Constitution of the United States, provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property without due process of law; . . . ."

(2) Federal Tort Claims Act: Sections

28 U.S.C. §1346(b):

"(a) The District Court shall have original jurisdiction, concurrent with the court of claims, of:

. . . .

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1915, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where

the act or omission occurred."

28 U.S.C. §2401(b):

"(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

28 U.S.C. §2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under the circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

28 U.S.C. §2675:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross claim, or counterclaim.

"(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

"(c) Disposition of any claim by the Attorney General or other head of a federal

agency shall not be competent evidence of liability or amount of damages."

28 U. S. C. §2679:

"(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

28 U.S.C. §2680:

"The provisions of this chapter and section 1346(b) of this title shall not apply to --

* * * * * * * * *

"(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

* * * * * * * * *

"(k) Any claim arising in a foreign country."

(3) Suits in Admiralty by or Against Vessels or Cargoes of United States, Title 46 U.S. Code, Chapter 20. (46 U.S.C. §§741-752).

46 U.S.C. §741 Exemption of United States Vessels and Cargoes from Arrest or Seizure

"No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provisions made herein for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: provided, that this chapter shall not apply to the Panama Railroad Company."

46 U.S.C. §742 Libel in Personam

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought

against the United States or against any corporation mentioned in Sec. 741 of this title. Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the case may, in the discretion of the court, be transferred to any other District Court of the United States."

46 U.S.C. §743 Procedure in Cases of Libel in Personam

"Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United

States or a corporation mentioned in Sec. 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4% per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libe, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the cargo or vessel been privately owned and possessed a libel in rem might have been obtained. Elections so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder."

46 U.S.C. §744 Release of Privately Owned Vessel After Seizure

"If a privately owned vessel not in the possession of the United States or of a corporation described in Sec. 741 of this title is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or

stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this chapter.

46 U.S.C. §745 Causes of Actions for Which Suits May Be Brought; Limitations; Exceptions; Actions Which May Not Be Revived; Interest on New Claims

"Suits as authorized by this chapter may be brought only within two years after the cause of action arises: provided, that where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: provided further, that the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed because solely improperly brought against any

person, partnership, association or corporation engaged by the United States to manage and conduct the business of a vessel owned or fare boat chartered by the United States or against the master of any such vessel: provided further that after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim was brought as authorized by Sec. 742 of this title unless upon a contract especially stipulating for the payment of interest."

46 U.S.C. §746 Exemptions and Limitations of Liability

"The United States or a corporation described in Sec. 741 of this title shall be entitled to the benefit of all exemptions and of all the limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

46 U.S.C. §747 Seizures in Foreign Jurisdictions

"If any vessel or cargo within the purview of Sec. 741 and 744 of this title is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, pierage, or ownership of such cargo, the Secretary of

State of the United States in his discretion, on the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States Consul residing at or nearest the place at which such action may have been commenced claims such vessel or cargo as immune from such arrest, attachment, or other seizure, then to execute an agreement, undertaking, bond or stipulation for and on behalf of the United States, or the Secretary of Commerce or a corporation described in Sec. 741 of this title as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States Consul to enter the appearance of the United States, or of the Secretary of Commerce, or of such corporation, and to pledge the credit thereof to the payment of any judgments or costs that may be entered in such suit. The Attorney General is vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment rule in any such suit, certified by the clerk of the court and authenticated by the

certificate and seal of the United States Consul, claiming such vessel, or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officer of the United States, or of the Secretary of Commerce, or of such corporation for the allowance and payment of such judgments: provided, however, that nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case."

46 U.S.C. §748 Payment of Judgment, Order, or Settlement

"Any final judgment rendered in any suits herein authorized, in any final judgment within the purview of Sec. 744 and 747 of this title, in any arbitration award or settlement herein agreed to under the provisions of Sec. 749 of this title, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is appropriated out of money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement."

46 U.S.C. §749 Arbitration, Compromise, or Settlement of Claims

"The Secretary of any department of the Government of the United States, or the board of trustees of any corporation mentioned in Sec. 741 of this title, having control of the possession or operation of any merchant vessel are, and each is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of Sec. 742, 744, and 750 of this title."

46 U.S.C. §750 Recovery for Salvage Services by Vessel or Crew

"The United States, and the crew of any merchant vessel owned or operated by the United States, or a corporation mentioned in Sec. 741 of this title, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any monies recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of such corporation, having control of the possession or operation of such vessel.

46 U.S.C. §751 Disposition of Monies Recovered by the United States

"All monies recovered in any suit brought by the United States on any cause of action

arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the corporations mentioned in Sec. 741 of this title, and a control of the vessel or cargo with respect to which said cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage or compensation for which such judgment was recovered has been or will be paid."

46 U.S.C. §752 Reports as to Awards and Settlements

"The Secretary of any Department of the United States, and the board of trustees of any corporation mentioned in Sec. 741 of this title, shall report to the Congress at each session thereof the arbitration awards or settlements of claims which shall have been agreed to under this chapter since the previous session, and in which the time to appeal shall have expired or have been waived."

(4) 46 U.S.C. §740 Extension of Admiralty and Maritime Jurisdiction

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel

on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: provided, that as to any suit against the United States for injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing damage."

(5) Death on the High Seas Act, Title 46, U.S. Code, Chapter 21. (46 U.S.C. §§761-767).

46 U.S.C. §761 Right of Action: Where and by Whom brought:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the

District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the District Court of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued."

46 U.S.C. §762 Amount and Apportionment of Recovery

"The recovery in such suits shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may have severally suffered by reason of the death of the person by whose representative the suit is brought."

46 U.S.C. §763 Limitations

"Suits shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered."

46 U.S.C. §764 Rights of Action Given by Laws of Foreign Countries

"Whenever a right of action is granted by the law of any foreign state on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding."

46 U.S.C. §765 Death of Plaintiff Pending Action

"If a person dies as the result of such wrongful act, neglect, or default as is mentioned in subsection 761 of this title during the pendency in court of admiralty of the United States of a suit to recover damage for personal injuries in respect to such act, neglect, or default, the personal representative of the decedent may be substituted as a party in the suit and may proceed as a suit under this chapter for the recovery of the compensation provided in Sec. 762 of this title."

46 U.S.C. §766 Contributory Negligence

"In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the courts shall take into consideration the degree of negligence attributable to the

decedent and reduce the recovery accordingly."

46 U.S.C. §767 Exceptions from Operation of Chapter

"The provisions of any state statute regulating or giving rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial waters of any state, or to any navigable waters in the Panama Canal Zone."

(6) Suits in Admiralty Against United States for Damages Caused by Public Vessels ("Public Vessels Act"), Title 46, U.S. Code, Chapter 22. (46 U.S.C. §§781-790).

46 U.S.C. §781 Libel in Admiralty Against or Impleader of United States

"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: provided, that the cause of action rose after the sixth day of April, 1920."

46 U.S.C. §782 Venue of Suit: Application of Provision of Chapter 20

"Such suits shall be brought in the District Court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States. Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest."

46 U.S.C. §783 Cross-libel, set-off, or counterclaim

"In the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross-libel in personam or claim a set-off or

counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action; provided, that whenever a cross-libel is filed for any cause of action for which the original libel is filed by authority of Sec. 781 through 790 of this title, the respondent in the cross-libel shall give security in the usual amount and form to respond to the claims set forth in said cross-libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given."

46 U.S.C. §784 Subpoenas to Officers or Members of Crews

"No officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under Sec. 781 through 790 of this title without the consent of the secretary of the department or the head of any independent establishment of the government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena."

46 U.S.C. §785 Suits by Nationals of Foreign Governments

"No suit may be brought under Sec. 781 through 790 of this title by a national of any foreign government unless it shall

appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts."

46 U.S.C. §786 Arbitration, Compromise, or Settlement

"The Attorney General of the United States is authorized to arbitrate, compromise, or settle any claim on which a libel or cross-libel would lie under the provisions of Sec. 781 through 790 of this title and for which a libel or cross-libel has actually been filed."

46 U.S.C. §787 Payment of Judgments or Settlements

"Any final judgment rendered on any libel or cross-libel herein authorized, and any settlement had and agreed to under the provisions of Sec. 786 of this title, shall upon presentation of a duly authenticated copy thereof, be paid by the proper accounting officer of the United States out of any monies in the Treasury of the United States appropriated therefor by Congress."

46 U.S.C. §788 Lien Not Created Against Public Vessels

"Nothing contained in Sec. 781 through 790 of this title shall be construed to recognize the existence of or as creating a lien

against any public vessel of the United States."

46 U.S.C. §789 Exemptions and Limitations of Liability

"The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

46 U.S.C. §790 Reports by Attorney General

"The Attorney General of the United States shall report to the Congress at each session thereof all claims which shall have been settled under Sec. 781 through 790 of this title."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-368

CAROLYN ROBERTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On November 21, 1972 petitioners filed suit against the United States for the wrongful death of the navigator of a private cargo airplane which crashed on July 27, 1970 in navigable waters 1500 to 1900 feet short of the runway at the Naha Air Base, Okinawa. As amended, petitioners' complaint alleged that United States Air Force personnel on the base negligently directed the landing of the plane and the subsequent unsuccessful efforts to rescue its crew. The amended complaint characterized petitioners' claims as "maritime" in nature and asserted that as against the United States they were cognizable by virtue of the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*, Rule 9(h) of the Federal Rules of Civil Procedure (relating to admiralty claims), and the Death on the High Seas Act, 46 U.S.C.

761, *et seq.* (Pet. App. A, 2). The government moved to dismiss the amended complaint on the ground, *inter alia,* that insofar as it alleged maritime claims against the United States it was cognizable only under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.,* and was barred by the two-year statute of limitations prescribed by that Act, 46 U.S.C. 745 (Pet. App. E, 8-9). The district court entered an order denying the motion (Pet. App. B, 1-2). On interlocutory appeal, the the court of appeals reversed the order of the district court because "to the extent that the appellees' claim is cognizable in admiralty, it is governed by the Suits in Admiralty Act and absolutely time-barred by § 745 of that Act" (498 F. 2d at 527; Pet. App. A, 10).

The decision of the court of appeals is correct, and consistent with the decisions of every other court of appeals which has considered the question. Therefore, further review by this Court is not warranted.

1. Prior to 1960, maritime actions against the United States under the Suits in Admiralty Act were limited by the language of 46 U.S.C. (1958 ed.) 742 to those involving merchant vessels owned by or operated for the United States, and the cargo of such vessels.[1] Accordingly, prior to 1960 most courts permitted plaintiffs with maritime tort claims against the United States which did not involve vessels or cargo to proceed under the Federal Tort Claims Act. *E.g., Somerset Seafood Co.* v.

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[1]Prior to 1960, 46 U.S.C. (1958 ed.) 742 provided in relevant part:

> In cases where if such vessel [owned by or operated for the United States] were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * *.

United States, 193 F. 2d 631 (C.A. 4); *Blumenthal* v. *United States*, 189 F. Supp. 439 (E.D. Pa.), affirmed, 306 F. 2d 16 (C.A. 3). However, in 1960 Congress amended the Suits in Admiralty Act, 46 U.S.C. 742, to permit maritime actions against the United States "if a private person or property were involved" (Pet. App. E, 5-6).[2] The Fifth Circuit, in an opinion written by Chief Judge Brown, and the Second Circuit, in an opinion written by Judge Friendly, have both properly interpreted this amendment as enlarging the scope of the Suits in Admiralty Act to include non-vessel maritime tort actions against the United States. *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 144 (C.A. 5); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167, 169 (C.A. 2). This interpretation, which was adopted by the court of appeals below, has been followed by all but one of the district courts which have considered the matter. *T.J. Falgout Boats, Inc.* v. *United States*, 361 F. Supp. 838 (C.D. Cal.); *Richmond Marine Panama, S.A.* v. *United States*, 350 F. Supp. 1210, 1212, 1219-1220 (S.D. N.Y.); *Utzinger* v. *United States*, 246 F. Supp. 1022 (S.D. Ohio); *Tankrederiet Gefion A/S* v. *United States*, 241 F. Supp. 83, 85 (E.D. Mich.); *Tebbs* v. *Baker-Whitely Towing Co.*, 227 F. Supp. 656,

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[1]Prior to 1960, 46 U.S.C. (1958 ed.) 742 provided in relevant part:

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[2]The present version of 46 U.S.C. 742 is, in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, *or if a private person or property were involved*, a proceeding in admiralty could be maintained, and appropriate nonjury proceeding in personam may be brought against the United States * * *. [Emphasis added.]

657-658 (D. Md.); *Beeler* v. *United States*, 224 F. Supp. 973, 975-976 (W.D. Pa.), reversed on other grounds, 338 F. 2d 687 (C.A. 3).[3] Accordingly, the holding of the court of appeals that petitioners' wrongful death action against the United States, to the extent it is maritime in nature,[4] was cognizable under the Suits in Admiralty Act,[5] is supported by the overwhelming weight of authority.[6]

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[3]The only reported decision to the contrary is *J.W. Petersen Coal & Oil Co.* v. *United States*, 323 F. Supp. 1199 (N.D. Ill.). However, the district court in that case did not cite any supporting authority for its interpretation of the 1960 amendment and its decision has not been followed by a single court.

[4]In the court of appeals the government disputed whether petitioners' claims were indeed maritime in nature. As the court of appeals pointed out, if they were "land" claims, they were barred by the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(k), because they arose in Okinawa (498 F. 2d at 522; Pet. App. A, 3). The court of appeals found it unnecessary to explicitly rule on this issue in view of its ultimate disposition (498 F. 2d at 525; Pet. App. A, 6), but it may be assumed for purposes of this petition that petitioners' claims are maritime in nature.

[5]Although petitioners also based their action on the Death on the High Seas Act, that Act does not authorize suit against the United States, and any cause of action it creates may be asserted against the United States only through the Suits in Admiralty Act.

[6]Petitioners' contention that the decision below conflicts with the decision of the Third Circuit in *Blumenthal* v. *United States*, 306 F. 2d 16, is erroneous. The complaint in *Blumenthal* was commenced *prior* to 1960 under the former version of 46 U.S.C. 742, and the Third Circuit in 1962 merely affirmed the decision of the district court that under the former version of 46 U.S.C. 742 a non-vessel maritime tort action against the United States could proceed under the Federal Tort Claims Act.

Since petititoners' complaint was cognizable under the Suits in Admiralty Act, it was not cognizable under the Federal Tort Claims Act, which is specifically not applicable to "[a]ny claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States." 28 U.S.C. 2680(d).

2. Maritime actions under the Suits in Admiralty Act must be brought within two years from the date of alleged injury. 46 U.S.C. 745. See *McMahon* v. *United States*, 342 U.S. 25. It is undisputed that the alleged injury in this case occurred on July 27, 1970, and that petitioners commenced suit more than two years later, on November 21, 1972. Since "[t]he time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable, but extinguishes the claim itself," *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, 778 (C.A. 2), the court of appeals correctly ruled that petitioners' complaint should have been dismissed by the district court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.